



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
MANPOWER AND RESERVE AFFAIRS
111 ARMY PENTAGON
WASHINGTON, DC 20310-0111

March 26, 2003

MEMORANDUM FOR CHIEF OF PUBLIC AFFAIRS

SUBJECT: Request for Exemption of Public Affairs Functions

Reference memorandum, Chief of Public Affairs (SAPA-PA), Subject: Change to CIGA Codes for Army Public Affairs, November 27, 2002.

Function. This decision includes public affairs function performed by military and civilian employees in the operating forces and infrastructure.

Decision. The majority of the Public Affairs function is exempt from competitive sourcing determinations. Title 5, U.S. Code, Section 3107 specifically prohibits the use of appropriated funds for a "publicity expert" unless specifically appropriated for that purpose. There are concerns regarding the use of contractors in a situation where it might be assumed that they are agency employees, which may support an inherently Governmental characterization of those aspects of the function relating to dealings with the public. However, I have determined that the Public Affairs function is not inherently Governmental. With respect to conversion, military personnel should be retained where Uniform Code of Military Justice (UCMJ) authority is needed to compel performance in deployment situations. Finally, certain public affairs support services have been successfully contracted out in the past, and the requestor agrees that writer-editors and series video specialists can be competed. In the event an installation becomes contractor operated, with only a few government employees remaining on-site to administer the contract, the local Public Affairs function will be effectively transferred from the local level to a higher-level organization.

Requestor's position. The Chief of Public Affairs contends that except for very limited support services, series writer-editors and series video specialists, the entire public affairs function is inherently Governmental and should be considered to be a core competency. Additionally, the requestor contends that functions currently being performed by military personnel should continue to be staffed in this way for operational reasons.

Standard of Review. The senior HQDA functional official for a function must describe and substantiate specifically how preparation and implementation of a Third Wave implementation plan for each course of action poses substantial and specific risks to a core war-fighting mission of the Army (i.e., a core competency) or violates a statutory requirement affecting a function. The following are the risk factors to evaluate this request: force management risk; operational risk; future challenges; and

institutional risk. How these risk criteria are applied may vary based on each course of action evaluated (i.e., A-76; alternatives to A-76; military conversions; transfer to another agency; divestiture). Therefore, exemption requests and decisions must assess the potentially adverse impact of each course of action.

Core Competency Relevant to Risk Issue. The Public Affairs (PA) function is included as an element in each of the six recognized core competencies of the Army as provided for in Army Field Manual 1 and The Army Plan. However, the most directly connected core competency would at the very least appear to be Support to Civil Authority. A core competency designation does not necessarily mandate military performance or preclude competitive sourcing. However, a core competency designation does preclude divestiture or transfer of the function.

Statutory Requirements Relevant to Risk Issue. Title 5, U.S. Code, Section 3107 prohibits the use of appropriated funds to pay for "publicity experts" unless specifically authorized by statute. Under Title 10, U.S. Code, Section 3014, the Office of the Secretary of the Army shall have sole responsibility within the Office of the Secretary and the Army Staff for the Public Affairs function. Therefore, the publicity expert aspects of the Public Affairs function cannot be contracted, and the Office of Chief, Public Affairs in Army management headquarters cannot be divested or transferred. However, the office can be divested, in part, based on workload, and is otherwise subject to Congressionally imposed ceilings on Army management headquarters. In addition, Title 10, U.S. Code, Section 3083 recognizes a career specialty for military Public Affairs officers.

Inherently Governmental Relevant to Outsourcing Decision. An inherently Governmental function includes those activities that require the exercise of substantial discretion in applying Government authority or the making of value judgments in making decisions for the Government. An inherently Governmental function is so intimately related to the public interest as to require performance by Federal Government. Although the public affairs function is not specifically mentioned in Office of Federal Procurement Policy (OFPP) Letter 92-1 (September 23, 1992), as being inherently Governmental, formulating public affairs policy in the Army management headquarters involves substantial exercise of discretion in applying Government authority. Additionally, OFPP Policy Letter 92-1 does caution against using contractors in such a way that it might be assumed that they are agency personnel. Although the OFPP Policy Letter provides such caution, the requestor does not demonstrate how the Public Affairs function meets the standard of an inherently Governmental function under the Federal Activities Inventory Reform Act (FAIR Act), Public Law 105-270, 112 Stat 2385 (October 19, 1998). Therefore, I have determined that the Public Affairs function is not inherently Governmental.

Statutes Relevant to Sourcing Decision. Title 5, U.S. Code, Section 3107 prohibits the use of appropriated funds to pay for "publicity experts" unless specifically authorized by statute. Public Affairs support functions, such as technical writing and editing, printing, and video production and editing, are not subject to this prohibition. Such support functions are subject to the normal process provided by Section 2461, Title 10 and Section 8014 of appropriations acts mandating public-private competition in certain circumstances, subject to the standard exceptions for 10 or fewer civilian employees, and preferential procurement programs.

Personal Services. Where supervision by an official making inherently Governmental decisions in a management headquarters is required for effective performance of an activity in support of that decision maker, there is a basis for exempting that activity, whether advisory or clerical support, to avoid an inappropriate personal services contract. In addition, if persons supervised by an inherently Governmental decision maker in turn must supervise individuals supporting them in order to effectively perform the activity, a further extension of this exemption may be warranted. In the case of contractors accompanying the operating forces, there also may be a legitimate basis for exempting the function from contractor performance. Exemption may be necessary to avoid inappropriate personal services arrangements, or if command and control of the contractor by the commander in the field is required for effective performance because of the cohesive nature of military units, doctrine, tactics, and the risks associated with combat. However, Army Field Manual 100-21, Contractors on the Battlefield, January 2003, recognizes these issues and the Army has apparently, so far, effectively used contractors in support of the operating forces under the Logistical Contract Augmentation Program (LOGCAP) in military operations in Somalia, Haiti, Kuwait, East Timor, and the Balkans, as well as in support of major combat operations in Desert Shield and Desert Storm. Since contractor support is authorized to support operating forces, I acknowledge there are situations where contract support may be provided without violating the prohibition on personal services contracts.

Conflicts of Interest. Compliance with OFPP 92-1 and the Title 5 funding restrictions with regard to publicity experts precludes conflict of interest issues from arising relating to contractor performance.

Military Conversions. Your request states that TDA military public affairs officers "are used extensively for deployment augmentation" and that "the Army provides 100 percent of the U.S. military's deployable PA units." The fact that public affairs is a deployable function does not necessarily mandate that all of these jobs may only be performed by uniformed personnel. To the extent that these personnel carry out the public affairs duties in sustainment areas rather than in the actual area of engagement, these public affairs functions may be carried out by civilians, subject to

DoD concurrence with the conversions since the Army provides 100 percent of DoD's deployable public affairs units. Indeed, non-military personnel are currently doing many jobs in areas close to the battlefield, as referenced in the preceding sub-section. Although the Government is barred from hiring publicity experts, there is no bar to converting military performance to performance by a civilian Government official appointed under Title 5.

The DoD Inventory of Commercial and Inherently Governmental Activities Guide to Inventory Submission (Inventory Guide), Enclosure 6, page 6-3 provides guidance regarding manpower mix criteria. "[Manpower] that perform duties and responsibilities that are integral to military command and control of combat and crisis situations" shall be designated as Military Operations (Code A). See Enclosure 6, page 6-3, paragraph 1. Components that perform combat and service support functions shall be designated Code A only if there is such a high likelihood of hostile fire or collateral damage that: 1) military authority, discipline, and training are needed to maintain control and, if necessary, reconstitute the unit, and 2) use of civilians or contract support constitutes an inappropriate or unacceptable risk.

Enclosure 8 of the Guide contains guidance for risk assessment. Applying the guidelines on p.8, paragraph 1-1, use of non-military personnel in combat support roles must be assessed in terms of risk to "the support mission and the missions dependent on that support." Combat mission failure or loss of life are severe risks, while "loss of support elements that augment or enhance operations in theatre during a conflict often have minor impact on combat operations." When a Public Affairs unit is deployed and refusal to obey a commander's orders would create a risk of loss of life or mission failure, authority under Article 2 of the Uniform Code of Military Justice (UCMJ) is necessary to compel performance. Although UCMJ jurisdiction applies to civilians accompanying the operating forces, which could include contractors, that jurisdiction only applies during a "declared war." Therefore, the public affairs deployable units and deployable individual mobilization augmentees should remain under command in deployment situations where mission failure or loss of life are severe risks.

In the infrastructure, the central issue (according to the Inventory Guide, Enclosure 6, page 6-9) is whether adequate performance of the function requires military unique knowledge and experience that can only be derived from *recent* first-hand involvement in military activities – i.e., through commanding military forces or conducting or participating in military operations or exercises. This knowledge and experience must be more substantial than familiarity with doctrine, tactics, operations, or regulations; capabilities that can be developed by civilians; or, advice military retirees can provide based on their knowledge and experiences. The use of military in public

affairs functions merits further review based on this standard in Total Army Analysis and the implementation planning process.

A handwritten signature in black ink, appearing to read "Reginald J. Brown". The signature is fluid and cursive, with the first name "Reginald" being more prominent.

Reginald J. Brown
Assistant Secretary of the Army
(Manpower and Reserve Affairs)

Enclosures

CODING RULES for Public Affairs

1. Office of the Chief of Public Affairs
 - a. Chief of Public Affairs
Code F – Unique, Knowledge and Skills
2. Military and Civilian Public Affairs Officers in the Generating Force in Public Affairs
 - a. Officers in FA46
Code L – Protected by law, statute, treaty or agreement
 - b. Enlisted CMF46
Code L – Protected by law, statute, treaty or agreement
 - c. Civilians in occupational series GS-1035
Code L – Protected by law, statute, treaty or agreement
3. Support to Public Affairs Officers
 - a. All personnel in same TDA paragraph as PAO's
(except Writer-Editors and Video Specialists)
Code L – Protected by law, statute, treaty or agreement